Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-370

SAM P. GARRISON,

Petitioner

v.

FLOYD STRICKLAND, JR.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Sam P. Garrison, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *Floyd Strickland, Jr. vs. Sam P. Garrison*, No. 76-1683, filed June 28, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals styled and filed as above is not yet reported but is printed as Appendix C to this petition (pp. 16-20, *post*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1) within ninety days of June 28, 1976, the date of entry of the order to be reviewed.

QUESTION PRESENTED

WHETHER THE GOVERNMENT MAY USE A CONFESSION OBTAINED AFTER IT INITIATED AN INTERVIEW WITH AN ACCUSED WHO HAD NOT TALKED TO COUNSEL AFTER HE HAD EARLIER STATED HE DESIRED TO DO SO.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment and the Fourteenth Amendment.

STATEMENT OF THE CASE

Floyd Strickland was a prisoner of the State of North Carolina convicted on or about June 22, 1973 in the Superior Court for Columbus County, North Carolina in cases number 73 CR 1950, 1951 and 1946, in which he was charged with breaking and entering, safecracking and safecracking respectively. Prayer for judgment was continued in the first of the cases but Strickland received a consolidated twenty-two to thirty year sentence on the remaining offenses. Strickland's conviction was affirmed on appeal by the North Carolina Court of Appeals, 22 NC App 196 (June 15, 1974), and the North Carolina Supreme Court denied certiorari to review that decision, 285 NC 662 (August 30, 1974).

In February, 1975, Strickland filled out a writ form which was duly authorized for filing *in forma pauperis*, and which was served on respondent below under cover letter of March 10, 1975, *Strickland v. Garrison*, 75-0072-HC. In this writ, he seemingly alleged that his confession was involuntary because investigating officers threatened to charge his relatives with the crime if he did not confess, and because he had not signed a written waiver of counsel. The relevant portions of his application for a writ are Appendix A to this petition, pp. 6-10, *post*. These contentions were ruled on unfavorably by the District Court, Honorable John D. Larkins, Jr., Judge Presiding, and

his application for a writ of habeas corpus was dismissed on or about July 3, 1975. Judge Larkins' order is Appendix B to this petition, pp. 11-15, *post*.

On appeal, however, a panel of the United States Court of Appeals for the Fourth Circuit reversed the District Court in a *per curiam* decision, entered without briefing or argument, *Strickland v. Garrison*, No. 76-1683. The panel took a broader view of Strickland's allegations than had the District Court and respondents below and found that "specifically Strickland contends that his confession was inadmissible because it was obtained by interrogation in the absence of counsel after Strickland had requested counsel be present." With this assertion, the panel agreed and ordered that a writ of habeas corpus be issued in Strickland's behalf. The relevant portions of the trial *voir dire* concerning this point are set out as Appendix D to this petition, pp. 21-25, *post*. According to the state's evidence (which was believed by the trial judge on *voir dire*), they show that petitioner was questioned at about 9:00 a.m., at which time he was given the warnings required by the *Miranda* decision. Following these, he declined to give a statement, saying that he wanted to see a lawyer. Questioning then ceased. About 3:00 p.m., another meeting was held between Strickland, who was in custody, and law enforcement officers. He was again warned of his rights pursuant to the *Miranda* decision at which time he did not ask for an attorney but instead gave a statement. According to Strickland's evidence, he gave the statement at the morning meeting, after his request for counsel was repeatedly refused, and no 3:00 p.m. meeting ever occurred.

REASONS FOR GRANTING THE WRIT

AN IMPORTANT OPEN QUESTION CONCERNING THE APPLICATION OF MIRANDA V. ARIZONA, 384 US 436 (1966) IS PRESENTED BY THIS CASE.

This case presents an open question akin to that decided in *Michigan v. Mosley*, 423 US 96 (1975)—(a) whether an

accused who has stopped interrogation by asking for a lawyer may change his mind and give an admissible statement without a lawyer having been consulted or being present; and (b) if so, can this occur if the authorities initiate the subsequent contact at which the statement occurs. The answer to both should be "Yes"; however, the Fourth Circuit has answered the second "No". Therefore, this important matter has been wrongly decided, especially in light of *Michigan v. Mosley, supra,* and a writ of certiorari should issue to correctly propound the law in this regard.

The admissibility of confessions is governed by the standards of voluntariness and waiver. Nothing in the facts of this case suggests that either was unmet. Petitioner received the "*Miranda* warnings," and nothing shows that he did not understand them. Presumptively then, any waiver of the rights involved in them could be intelligently made. Interrogation ceased when he said he wanted a lawyer. Six hours passed before contact was resumed. That subsequent contact began with new *Miranda* warnings. Nothing in the way of illegal threats or promises or actual brutality or mental coercion existed. All of these demonstrate the confession was voluntary. Under these circumstances, it should not have been excluded.

Despite the above, the Fourth Circuit did not condition admissibility on the presence or absence of the above, but instead "zeroed in" on the fact that the authorities evidently initiated the subsequent contact with the accused and held this to be a *per se* factor requiring exclusion of any statements by Strickland.[1] This is non-sensical. Since jailing and law enforcement duties are often handled by different officers, or subsections of larger offices; since employees work shifts and take breaks; and since office hours for investigating officers are

[1]While the panel spoke darkly of "entreaties . . . proceed without counsel" and "precluding the petitioner from communicating with counsel" to bolster its decision, neither appears of record insofar as respondent can tell.

irregular, it is to be expected that diligent law enforcement officers might deal directly with an accused to determine if he had yet seen counsel or if he still desired to do so. How they deal with an accused, however, and not whether they initiate the dealings is the relevant matter with regard to whether any statement taken is voluntary and any waiver of the rights involved are intelligently made. For this reason, the Fourth Circuit panel erred in its decision.

CONCLUSION

It is respectfully submitted that because of the above, this case is of sufficient importance for the Court to exercise its jurisdiction and issue a writ of certiorari to review the decision of the United States Court of Appeals, either to summarily reverse it, or to set the matter for briefing and argument.

Respectfully submitted,

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Appendix A

RELEVANT PORTIONS OF THE APPLICATION FOR WRIT OF HABEAS CORPUS

Petitioner was denied due process of law when an oral confession was elicited from him under threat during police interrogation. Petitioner's mother, brother and cousin would be indicted for the same crime, after petitioner invoked his Fifth Amendment right to remain silent, and after he requested the assistance of counsel at interrogation; and the coerced oral confession was admitted into evidence by the prosecution to the trial jury.

* * * * * * * * * * * * *

On the morning of March 14, 1973 between 8:00 and 8:30 A.M. the petitioner was questioned by S.B.I. Agent Wesley Terry and was asked by Terry if he, the petitioner, wished to make a statement. Petitioner declined at which point Agent Terry seemed to get angry.

Agent Terry then threatened to have petitioner's brother and cousin with the possibility, also, of his mother, Mrs. Grace Strickland indicted. Petitioner then became upset and confessed to the alleged crimes.

It should be noted that at this time petitioner had not, nor has since, signed a waiver of his rights to counsel.

Later that afternoon, after petitioner was transferred from Fair Bluff, North Carolina, petitioner was then again questioned by S.B.I. Agent Terry but petitioner then recanted his earlier confession and informed Agent Terry that he was in fact innocent of the charges against him and was going to plead not guilty all the way. At no time after requesting counsel had petitioner signed a waiver of his rights or even "orally" relinquish [*sic*] his rights as established by *Miranda*. The voluntary and coerced confession was used in court against him.

MEMORANDUM OF POINTS AND AUTHORITIES

The historical background on standards for admitting confessions began with Brown "vs" Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936). The case involved physical beating of a confession from a defendant and the court held such a confession illegal. In Ashcraft "vs" Tennessee, 322 U.S. 143, 64 S.Ct. 921, L.Ed. 1192 (1944) convection [*sic*] was reversed where a confession had been obtained after some *36* hours of continious [*sic*] interrogation. A court ruled that the extended questoning [*sic*] raised a conclusive presumption of coerceion [*sic*]. In the famous stomach pumping case of Rochen "vs" California, 342 U.S. 165, 72 S.Ct. 205, 98 L.Ed. 183 (1952) the court speaking through Justice Frankfurter viewed the coerced confession cases pointing out: Use of involuntary verbal confessions in state criminal trials is obnoxious not only because of their unrealibity [*sic*], they are inadmissible under the due process clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. That the court was applying two constitutional standards for the admissibility of confessions—a "police methods" test as well as a trustwortheness [*sic*] test was made clear by Spano "vs" New York, 360 U.S. 315 (1959). In Rogers "vs" Richmond after a team of at least three police officers had interogated [*sic*] him for *six* hrs. without success, a threat to bring his invalidated [*sic*] wife down to headquarters for questoning [*sic*] prompted him to confess to the murder for which he was convicted. The court ruled (7-2) per Frankfurter, J. that the state's failure to apply the standard demanded by the Fourteenth Amendment due process entitled him to federal habeas corpus relief.

In this case police officers threatened to indict the petitioner's mother, brother and cousin unless petitioner confessed.

As Justice Frankfurter pointed out for the majority in the famous case of McNabb "vs" United States, 318 U.S. 332, 63

S.Ct. 608, 87 L.Ed. 819 (1943) while the powers of the court to upset state convictions is [*sic*] limited to the enforcement of the Fourteenth Amendment due process, the standards of federal criminal justice "are not satisfied merely by the observence [*sic*] of those minimal historic safeguards."

The court farther [*sic*] reterated [*sic*] thier [*sic*] principles in Mallory "vs" United States, 354 U.S. 449 (1957).

The right to have counsel present during police interrogation began to attach in cases such as Crocker "vs" California, 357 U.S. 433 (1958) in Cicenia "vs" Lagay, 357 U.S. 504 (1958). Finally, in Malloy "vs" Hogan, supra, the court applied federal standards to the admissibility of a confession in state criminal prosecutions.

In Escobedo "vs" Illinois, 378 U.S. 478 (1964), the court held that the "assistance of counsel" during the course of an interrogation was made obligatory upon the states by the Fourteenth Amendment. The court reached the ultimate decesion [*sic*] in Miranda "vs" Arizonia, [*sic*] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). The holding of the court was that the prosecution may not use statements, whether exculpatory or inculpatory, steeming [*sic*] from custodial interrogation of the defendant unless it demonstrates the use of procedueal [*sic*] safeguards effective to secure the prevelege [*sic*] of self-incrimination. The court had allready [*sic*] established that the right to counsel attached when focus was placed upon the accused. In Miranda the court held that the accused must be warned that he has the right to remain silent, and that any statement he makes may be used as evidence aganist [*sic*] him and that he has the right to assistance of counsel and if he could not afford counsel, one would be appointed for him. The defendant may waive effecuation [*sic*] of these rights provided the waiver is made voluntary [*sic*] knowingly and intellegently [*sic*]. The court stressed that once the defendant has made known his desire for an attorney all questeoning [*sic*] must cease. A defendant arrested and surronded [*sic*] by custodial officials has been

psychologically weakened to the point he may confess. Finally, the court held that whatever the testimony of the authorities has to waiver of rights by an accused, the fact of lengthey [*sic*] interrogation or inceaeaiation [*sic*] before a statement is made is strong evidence that the accused did not validly waiver [*sic*] his rights. In these circumstances the fact that the individual eventually made a statement is consistante [*sic*] with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistante [*sic*] with any notion of a voluntarily relinquishment of the privelege [*sic*]. Moreover, any evidence that the accused was threatened, tricked, as cajoled into a waiver will, of course show that the defendant did not voluntary [*sic*] waive his prevelege [*sic*]. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privelege [*sic*] and not simply a preleminary [*sic*] ritual to existing methods of interrogation. As set out in the instant case, petitioner was just questeoned [*sic*] about the crimes between 8:00 and 8:30 A.M. on March 14, 1973. At that time, petitioner requested counsel. S.B.I. Agent Westly [*sic*] Terry then seemed angry. He (Terry) then threatened to have petitioner's mother, brother and cousin indicted for the same crimes unless petitioner confessed. Under this threat and without the assistance of counsel, or waiver of assistance of counsel, petitioner confessed. Subsequent to the confession, petitioner's brother and cousin was [*sic*] released from police custody. Later the same day, March 14, 1973 after being removed from Fair Bluff to the County Jail in Whiteville, North Carolina, S.B.I. Agent Terry again questeoned [*sic*] petitioner. Petitioner made no statement, at this interrogation, but stated that he intended to plead not guilty. The oral confession give [*sic*] S.B.I. Terry [*sic*] at 8:00 or 8:30 A.M. on March 14, 1973 without petitioner giveing [*sic*] a waiver of his "Miranda" rights was later admitted into evidence at his trial and conviction upon the charge. As clearly seen, the admissibility of the oral confession was in violation of petitioner's Fifth and Fourteenth Amendment rights to the United States Constitution and Miranda, supra. The record in this

instant case is silent as to petitioner's signing a waiver of his Fifth and Fourteenth Amendment rights as set fourtth [*sic*] in Miranda, supra.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 75-0072-HC

FLOYD STRICKLAND, JR., Petitioner,	)	MEMORANDUM OPINION and ORDER
V.	)	
SAM P. GARRISON, Respondent.	)	

LARKINS, District Judge:

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, in which the petitioner, Floyd Strickland, Jr., presently incarcerated at North Carolina Central Prison, Raleigh, North Carolina, claims that he is being detained in violation of his rights under the Constitution of the United States.

At the June 22, 1973 Session of the Superior Court for Columbus County, the petitioner, while represented by court-appointed counsel, entered a plea of not guilty to indictments charging him with two counts of safe robbery and one count of breaking and entering. Upon these pleas the petitioner was tried and convicted in a jury trial and sentenced to a consolidated term of imprisonment of twenty-two to thirty years on the two safe robbery charges and prayer for judgment was continued on the breaking and entering charge. The petitioner appealed this conviction to the North Carolina Court of Appeals, which court, in an opinion filed June 19, 1974 and reported at 22 N.C. App. 196, 205 S.E.2d 765, found no error. An examination of the State Court records reveals that Strickland has exhausted his State remedies as required by Title 28, United States Code, Section 2254(b).

In support of his plea that the State Court conviction and sentence be vacated and set aside, the petitioner presents two contentions: first, that his confession was involuntary and made only because law enforcement officers threatened with prosecution his mother, brother and cousin if he did not confess; and, second, that he did not execute a written waiver of his rights to silence or counsel. The entire uncontested State Court record is before this Court, including the Record on Appeal submitted to the North Carolina Court of Appeals.

Strickland's first contention is that his confession was involuntary and made only because law enforcement officers threatened with prosecution his mother, his brother and his cousin if he did not confess. At the State trial there was a lengthy *voir dire* on the question of whether or not any admission, confession or statement was made by the petitioner and, if so, whether or not it was made freely, voluntarily and legally. As a result of this *voir dire*, extensive findings of fact were made by the State Trial Judge which may be accepted in lieu of a hearing on the petitioner's application. See *Townsend* v. *Sain*, 372 U.S. 293, 88 S.Ct. 745, 9 L.Ed.2d 770 (1963).

After extensive and exhaustive review of the evidence presented on *voir dire*, this Court adopts the State Trial Judge's finding that any confession made by the petitioner was executed freely and voluntarily after a valid oral waiver of his rights to remain silent and to consultation with counsel pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This Court finds that Strickland received a full and fair hearing on his claim in the State Court and further finds that the State *voir dire* hearing contained in the Record on Appeal amply supports the conclusion that Strickland's statements were voluntarily made.

The Supreme Court of the United States in its decision in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854, 862 (1973) reviewed the case law regarding the "voluntariness" of a defendant's confession for purposes

of the Fourteenth Amendment and pointed out that "[i]n determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. . . . The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances.

Under the circumstances surrounding the crimes of which the petitioner has been found guilty, the close relatives of the petitioner were subject to criminal indictment. The petitioner would naturally take such consequences into consideration when making the decision to make a statement or confession. The law enforcement officers were not making false statements to the petitioner in order to extract a confession; on the contrary, the true statements of possible legal consequences were a positive aid to the petitioner in his own determination of his situation. It was one circumstance to consider in arriving at his decision on whether or not to make a statement or confession. Adhering to the rule enunciated in *Schneckloth* v. *Bustamonte*, supra, this Court cannot take this one fact or circumstance and vacate the sentence and conviction of the petitioner. It is the opinion of this Court that the statement or statements made by the petitioner were voluntarily and freely executed, that his constitutional rights proclaimed in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were twice read to him and that he made a valid waiver of those rights. The State Trial Judge's findings and this Court's findings clearly satisfy the rule set forth by the Fourth Circuit Court of Appeals in *United States* v. *Johnson*, 495 F.2d 378 (4th Cir., 1974). The fact of voluntariness of a confession need only be demonstrated by a preponderance of the evidence.

The petitioner also contends that his conviction and sentence should be set aside in view of the fact that he signed no written

waiver of his rights to remain silent and to counsel. The facts are ably set forth in the Trial Judge's Findings of Fact in the Record on Appeal to the North Carolina Court of Appeals and in the summary of the Transcript in the Record on Appeal. Again, applying the rules in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) and *United States* v. *Johnson*, *supra*, and considering that Strickland had sufficient experience in the criminal courts of various states to indicate his understanding of the explanation of his rights and considering his apparent intelligence as indicated by his many written letters to this Court, it is the opinion of this Court that his failure to sign a written waiver did not render the confession inadmissible. See *United States* v. *Thompson*, 417 F.2d 196 (4th Cir., 1970); *United States* v. *Hayes*, 385 F.2d 375 (4th Cir., 1967), cert. denied, 390 U.S. 1006, 88 S.Ct. 1250, 20 L.Ed.2d 106 (1968).

NOW THEREFORE, in accordance with the foregoing, it is

ORDERED, that the petition for a writ of Habeas Corpus pursuant to 28 U.S.C. §2254 be, and the same is DENIED,

FURTHER ORDERED, that this case be, and the same is hereby DISMISSED, and

FURTHER ORDERED, that the Clerk shall serve copies of this ORDER upon Mr. Floyd Strickland, Jr., 835 West Morgan Street, Raleigh, North Carolina 27603 and Mr. Richard N. League, Assistant Attorney General of North Carolina, P. O. Box 629, Raleigh, North Carolina 27602.

Let this ORDER be entered forthwith.

JOHN D. LARKINS, JR.
United States District Judge

AT TRENTON, NORTH CAROLINA

JULY 1st, 1975

Filed July 3, 1975
JOHN R. WHITTY, CLERK
U.S. District Court
E. Dist. No. Car.

Appendix C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76-1683

Floyd Strickland, Jr.,

Appellant,

v.

Sam P. Garrison,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. John D. Larkins, Jr., District Judge.

Submitted: April 20, 1976 Decided: June 28, 1976

Before WINTER CRAVEN, and BUTZNER, Circuit Judges.

(Floyd Strickland, Appellant *Pro Se*. Richard N. League, Assistant Attorney General, for the Appellee.)

PER CURIAM:

Floyd Strickland, Jr., appeals from an order of the district court denying a writ of habeas corpus. Before seeking federal habeas corpus relief, Strickland exhausted his available state remedies. He claims that his state court conviction for safe robbery and breaking and entering is invalid because his confession, admitted into evidence at his trial, was obtained in violation of the requirements of Miranda v. Arizona, 384 U.S. 436 (1966). Specifically, Strickland contends that his con-

fession was inadmissible because it was obtained by interrogation in the absence of counsel after Strickland had requested that counsel be present.. We agree and reverse.

We accept, as did the district court, the findings of fact of the state trial court. Strickland was arrested on the morning of March 14, 1973. At 9:00 A.M., in the Fair Bluff, North Carolina, police station, agent Terry of the state bureau of investigation informed Strickland of his *Miranda* rights and asked him if he wanted to make a statement. "Strickland reflected for a few minutes, said he knew nothing about the break-in, and said he wanted a lawyer; [and] the interrogation was stopped." At noon, Strickland was taken to the county law enforcement center at Whiteville. At about 3:00 P.M., agent Terry again spoke with Strickland, warned him of his rights, and asked him if he desired to make a statement. Strickland stated that he understood his rights, and confessed. No lawyer was present.

In *Miranda*, the Supreme Court unequivocally stated: "If the individual states that he wants an attorney, the interrogation must cease *until an attorney is present.*" 384 U.S. at 474 (emphasis added). While a suspect's invocation of his right to remain silent, unaccompanied by a request for counsel, does not forever foreclose further efforts at interrogation, Michigan v. Mosley, 423 U.S. 96 (1975), "clearly the Court in *Miranda* . . . distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney . . . ," *id.* at 104 n.10; only in the latter situation did the Court "create a *per se* rule against further interrogation, *id.* at 109 (concurring opinion of White, J.). Thus, *Mosley* has no application to the present case. *See id.* at 101 n.7 (opinion of the Court).

Once a suspect in custody has expressed his wish to be represented by counsel, the police must deal with him as if he is thus represented. Thereafter, it is improper for the police to initiate any communication with the suspect other than

through his legal representative, even for the limited purpose of seeking to persuade him to reconsider his decision to insist on the presence of counsel. "[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Id.* at 110 n.2 (concurring opinion of White, J.).

Of course, a suspect who has invoked his right to have counsel present during a custodial interrogation may change his mind, by his own volition, *see* United States v. Tafoya, 459 F.2d 424, 427 (10 Cir. 1972), or after consulting with counsel, *see* United States v. Brown, 459 F.2d 319, 323 (5 Cir. 1971), *cert. denied*, 409 U.S. 864 (1972), and decide to submit to questioning without the aid of counsel. But *Miranda* and our own prior cases, *e.g.*, United States v. Clark, 499 F.2d 802, 807-08 (4 Cir. 1974), United States v. Slaughter, 366 F.2d 833, 840-41 (4 Cir. 1966), established that a confession obtained from a suspect who has yielded to the entreaties of the police that he proceed without counsel is inadmissible. "At the very least, the agents should have afforded [the suspect] sufficient time to employ and consult with counsel before *they initiate*[*d*] any subsequent interview." *Clark, supra*, 499 F.2d at 807 (emphasis in original).

Here, as in *Clark*, "agent [Terry] stated unequivocally that he initiated the interview during which [Strickland] allegedly waived his right to speak with an attorney and confessed;" and "[t]here is nothing in the record to suggest that agent [Terry's] decision to conduct a second interrogation of [Strickland] was prompted by any manifestation on the part of [Strickland] that he had changed his mind and desired to be interrogated without assistance of counsel . . . ." *Clark, supra*, 499 F.2d at 807. We therefore conclude that "*interrogation* [did not] cease until an attorney [was] present," 384 U.S. at 474 (emphasis added, as required by *Miranda*.

The state trial court concluded that Strickland "requested

an attorney for the purpose only of stopping the interrogation, the defendant knowing that a lawyer was not available in Fair Bluff." We believe that a suspect's subjective intent in requesting a lawyer is irrelevant to the state's obligation to provide one. Furthermore, the *Miranda* Court, in rejecting an interpretation of its holding which would have required each police station to have a lawyer present at all times, expressly contemplated that as a result of its decision the police might have to delay interrogation of a suspect until a lawyer could be found. 384 U.S. at 474.

Of course, if a suspect expresses a desire to consult with retained counsel and then unreasonably delays in so doing, the police might in some circumstances be justified in requiring him to accept substitute counsel, or even in continuing the interrogation without counsel. But the police cannot credibly claim delay by the suspect where the suspect has requested that counsel be appointed, or where the police themselves have precluded the suspect from communicating with retained counsel. The record is silent as to whether Strickland wanted to see appointed or retained counsel; and the facts are in dispute as to whether the police interfered with Strickland's efforts to obtain a lawyer. The state trial court concluded, though without apparent basis in the record except, possibly, through judicial notice, that no lawyer was available in Fair Bluff. Certainly if this conclusion is correct, Strickland cannot be faulted for failing to obtain counsel during the three hours he was held there. In any event, assuming the full six-hour delay between the first and second interrogation to be attributable to Strickland, we do not find six hours to be an unreasonable period indicative of dilatoriness. *See Slaughter, supra*, at 840 ("[I]t cannot be said that his failure to have a lawyer within approximately 25 hours of his request was unreasonable delay on his part, or an attempt to postpone indefinitely a decision on his part whether to submit to interrogation").

We hold that Strickland's confession was obtained in violation of the fifth amendment and the requirements of Miranda

v. Arizona, *supra*. Accordingly, a certificate of probable cause is granted, the decision of the district court is reversed, and the case is remanded with instructions that the writ be granted.

REVERSED AND REMANDED.

Appendix D

Excerpts from the direct examination of Agent W. P. Terry.

My name is W. P. Terry. I am employed by the North Carolina State Bureau of Investigation as a Special Agent. I did investigate this alleged break-in that occurred on the 14th day of March, 1973. I had occasion to talk with Mr. Strickland, approximately on the 14th of March two separate and distinct occasions, the first time being approximately eight to nine a.m. on the 14th of March of this year. The second time was at the Whiteville S.B.I. Office located in the Columbus County Law Enforcement Center at approximately three p.m. on the 14th of March, 1973.

I did have occasion to speak to Mr. Strickland on the morning of the 14th of March at approximately between eight and nine a.m. I interviewed him twice.

I was first talking with the defendant Strickland alone at the point of the second interview. My initial contact with Mr. Strickland, I do not recall who was present. I know there were some people there, but I do not recall. It was approximately in the area of nine a.m. on the morning of the 14th of March. It occurred at the Fair Bluff Police Department. I believe there were other people standing in the area beside Mr. Strickland and myself but I do not recall who. I warned him of his rights at that time. I advised Mr. Strickland the Constitution of the United States and the State of North Carolina guarantee certain rights, which were as follows: "You do not have to say anything which might incriminate you. Anything you do say may be used for or against you in a court of law. You have the right to speak with an attorney or anyone of your choice before making any statements. If you desire an attorney and cannot afford one, the State will appoint an attorney for you.

Do you understand fully these rights as I have explained them to you?"

Mr. Strickland stated he did understand his rights. I asked Mr. Strickland for a statement, which he declined. I had another meeting with him at approximately three p.m. on the 14th of March of this year at the Whiteville S.B.I. Office. Chief Holmes of the Fair Bluff Police Department, and myself, and Mr. Strickland, initially were present. I asked him at that time if he desired to give a statement. He was advised of his constitutional rights. I advised him: "The Constitution of the United States and the State of North Carolina guarantee you certain rights, which are as follows: "You do not have to say anything which might incriminate you. Anything you do say may be used for or against you in a court of law. You have the right to speak with an attorney or anyone of your choice before making any statements. If you desire an attorney and cannot afford one, the State will appoint an attorney for you. Do you understand fully these rights as I have explained them to you," He stated he did understand, and said he would make a statement only in the presence of Mr. Alexander as he did not want to keep anything from him.

Excerpts from the cross-examination of Agent W. P. Terry.

The first time I read the rights to Mr. Strickland, he declined to comment before speaking with an attorney. The rights were not read at Fair Bluff.

As to whether, he was then transported to the Law Enforcement Center here in Whiteville and the rights were read to him, I did not read the rights. The rights were quoted to him as I have quoted them here today. I don't read them from a card. I don't have a card. I have them memorized. As to whether I had a card before me the second time I began to give him his rights and I dropped the card on the floor, my answer is, "No, sir. Not to my recollection I did not." As many times as I have administered the Miranda warning I do not

use a card. I have committed it to memory. I did not use a card and I quoted them to him.

Mr. Strickland stated that he would like to talk to an attorney. In response to that I stopped questioning him. And I didn't question him any more until three p.m. on the 14th. He was brought to me at the S.B.I. Office.

At the first time he did request an attorney. The second time he did not request an attorney. He did not request that I get him an attorney or that he be allowed to call and get an attorney. I don't believe that silence is an indication of wanting an attorney. He did not request that he wanted to make a phone call. I did not deny him a telephone call. I personally advised both Mr. Strickland and Mr. Alexander they might use the phone in my office.

To my knowledge he did not use it at three o'clock in the afternoon. I don't recall if Mr. Strickland requested to use the phone. The Sheriff accompanied me in the initial investigation. I do not recall that the Sheriff made a statement to me or that Mr. Holmes made the statement to me that they had stated to Mrs. Grace Strickland that unless her son confessed that she would be charged with the crime of accessory or aiding and abetting. I don't recall anyone making that statement to me. If Sheriff Ben Duke made it to me, I don't recall it. I could not accurately testify. At three o'clock Mr. Strickland did not at any time say anything about wanting an attorney.

Excerpts from the direct examination of Floyd Strickland, Jr.

I am Floyd Strickland, Jr., and I am one of the defendants in this action. I had an occasion on March the 14th, 1973, to talk with Ben Duke, Bobby Holmes, or Mr. Terry. I talked with them somewhere in the neighborhood of between eight or eight-thirty. The first time I talked to Mr. Terry, I did make a statement. At that time he did not read my rights to me. He did not say them to me. I made the statement to him that

I had broken into the store that he said was in question; I did open the safe that was in question; I did commit the crime. I did not sign a waiver of my rights. This took place in Fair Bluff between eight and eight-thirty. He made a statement to me before I made the confession that I broke and entered and opened the safe. He made the statement that my brother, Franklin Strickland, and my cousin, Tony, was going to be indicted and possibly my mother; and the only way they could be turned loose was that I confessed. I asked Mr. Terry what was he trying to do, was he trying to use my family, put my whole family in jail to force me to confess to a crime I had not committed. At that time my brother was in the Fair Bluff jail. My mother at that time was in the police station.

I constantly asked for an attorney. I did not ask for any particular lawyer. I did not have a chance to make a phone call. I asked to make one, and they wouldn't allow me to make it. As to where I was going to make the phone call to, I was going to try to get an attorney somewhere. I didn't know for sure. I was just going to call a lawyer and ask him to come down there.

As to whether I was going to call my mother to get a lawyer or what, my mother was in the police station. I was going to call an attorney. Mr. Terry brought me to the Columbus County Jail. I did not make a statement later on. I did not make a statement around three o'clock in the afternoon on the 14th day of March. The only statement and the only confession that I made was at eight o'clock in the morning in Fair Bluff. My brother or my cousin were not indicted, nor was my mother indicted. Mr. Terry was good enough to keep his word. He said he would turn them loose if I confessed. That morning I confessed, and he turned them aloose. I told him that afternoon at three o'clock that I didn't do it after they released my mother and my brother and cousin. He later called me at three o'clock that afternoon, approximately three o'clock that afternoon, in his office. He wanted me to make another statement. I told him that I had made my statement that morning and

now I was pleading not guilty and I wanted an attorney. We joked; he joked and I joked. He tried to get me to talk and say something. I told him that I had made my statement, that I hadn't done anything. I made the statement that morning at eight o'clock, because he (Mr. Terry) give me his word he was going to put my mother in jail and my brother and he was going to indict them.

Appendix E

VOIR DIRE FINDING — FILE 73CR1889, 1890, 1891
FILE 73CR1946, 1950, 1951.

The State has established by clear and convincing evidence, and the Court finds, the following:

(1) That on March 14, 1973, Officer L. D. Hammond of the Fair Bluff Police Department, while on vehicular patrol following a car he had under surveillance, saw the car stop and saw the defendant Joseph Francis Alexander approach the car and then run back from near a city street and hide in the recess of a house; the officer apprehended said defendant, who refused to answer any questions; said defendant was then searched by Officer Hammond, who found a box of .22 caliber cartridges, and shortly thereafter on a second search found a $100 bill in defendant's pocket, rolled up, and when asked if defendant wanted a receipt, said he did not want the money, that it belonged to Carl Meares, who was known as the manager of Ellis Meares & Son, Inc.

(2) That Officer Hammond and Chief of Police Bobby Holmes, about twenty minutes after said defendant was apprehended returned to the house where said defendant was hiding and found a canvas bag containing $2,667.65.

(3) That said officers then determined that there was a breaking and entering of the store building of Ellis Meares & Son, Inc., in Fair Bluff.

(4) That the driver of the car under surveillance and the passenger, a brother and first cousin of the defendant Strickland, were taken into custody and retained at the local jail.

(5) That S.B.I. Agent W. P. Terry, Chief Holmes, and Sheriff A. L. "Ben" Duke then went to the home of the parents of the defendant Strickland where Chief Holmes told Mrs. Strickland that he had her son, Franklin Strickland, and his cousin in custody in connection with the break-in; that if she

were hiding the defendant Floyd Strickland, Jr., and knew he had committed the crime, she could be indicted; and that if she knew where the defendant Floyd Strickland, Jr., was she should tell him to come to police headquarters.

(6) That shortly thereafter, about eight a.m., the defendant Strickland came to the police station and "turned himself in," and he was placed in custody.

(7) The Officer Hammond and S.B.I. Agent Terry then took the defendant Alexander to the office at the police station, advised him of his Miranda rights, and asked if he wanted to make a statement; that the defendant Alexander said he would make a statement if Officer Hammond would leave; that the defendant Alexander then made a statement and told Agent Terry that he and the defendant Strickland had made an entry through the roof of the store, opened two safes with tools, took some money, stole two pistols, and then left.

(8) That at about nine a.m. Agent Terry and Chief Holmes, in an office at the police station, S.B.I. Agent Terry warned the defendant Strickland of his Miranda rights and asked him if he wanted to make a statement and told him that it appeared his brother and his cousin could be implicated since they drove the car away from the place where the defendant Alexander was apprehended; that the defendant Strickland reflected for a few minutes, said he knew nothing about the break-in, and said he wanted a lawyer; that the interrogation was stopped.

(9) That about noon Franklin Strickland and his cousin were released, and the defendants Strickland and Alexander were transferred to the Columbus County Law Enforcement Center, in Whiteville.

(10) That about three p.m. the defendant Strickland was brought to Agent Terry's office in the Law Enforcement Center where Agent Terry and Chief Holmes were waiting; that Agent Terry again warned the defendant Strickland of his

Miranda rights; that the defendant stated he understood his rights, and that he would make a statement if the defendant Alexander were brought in because he did not want to talk behind his back; that the defendant Alexander was brought in; and that the defendant Strickland made a joint confession with the defendant Alexander.

(11) That the defendant Strickland has been convicted twice of receiving stolen goods, of breaking or entering, of larceny, and of escape.

And the Court concludes as follows:

(1) That when Chief Holmes and S.B.I. Agent Terry attempted to interrogate the defendant Strickland at nine a.m. the defendant understood his rights against self-incrimination and requested an attorney for the purpose only of stopping the interrogation, the defendant knowing that a lawyer was not available in Fair Bluff.

(2) That when the defendant Strickland was interrogated in the office of Agent Terry at three p.m. he was again advised of his Miranda rights, which he understood, and he knew that he had the right to have an attorney present but he did not request an attorney and did not want one.

(3) That the defendant Strickland had a strong feeling of friendship for the defendant Alexander, knew that the law officers had a strong case against Alexander, and knew that the officers were confident that he was acting in concert with the defendant Alexander.

(4) That the testimony of the defendant Strickland on Voir Dire is not believable.

(5) That the confession of the defendant Alexander made about eight a.m. on the 14th day of March, 1973, was made after being warned of his Miranda rights, which he fully understood, and was freely, voluntarily, and knowingly made; and that his joint confession with the defendant Strickland,

made the same day at about three p.m. was voluntarily and knowingly made when only the defendant Strickland was being interrogated by the law officers.

(6) That the defendant Strickland has a substantial criminal record and had acquired substantial knowledge of criminal procedure and law, including his Miranda rights, and his confession was not motivated by any promise of immunity for his brother, Franklin Strickland, but was made after being warned of his Miranda rights, which he understood, and was freely, voluntarily, and knowingly made.

Prepared after jury retired on Friday, 22 June 1973.

s / EDWARD B. CLARK
Judge Presiding